IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

MONDAY, THE 30TH JULY 2007 / 8TH SRAVANA 1929

WP(C).No. 5836 of 2005(T)

CMA.73/04 OF DISTRICT COURT, KOZHIKODE.
IA.1179/04 IN OS.60/1990 of ADDL.M.C., KOZHIKODE-II

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PETITIONERS:

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1. NALINI JANARDHANAN, W/O.JANARDHANAN,
AGED 65 YEARS, PANNIYANKARA AMSOM AND DESOM,
KOZHIKODE TALUK. (DIED)

ADDL. 2. K.JANARDHANAN, S/O.APPUTTY, KOORKAPARAMBU
HOUSE, PANNIYANKARA AMSOM, DESOM,
KOZHIKODE TALUK.

ADDL. 3. SWAMINATHAN, S/O.LATE NALINI JANARDHANAN,
AGED 31 YEARS, KOORKAPARAMBU
HOUSE, PANNIYANKARA AMSOM, DESOM,
KOZHIKODE TALUK.

ADDL. 4. K.SHAJI, S/O.LATE NALINI JANARDHANAN,
AGED 29 YEARS, KOORKAPARAMBU
HOUSE, PANNIYANKARA AMSOM, DESOM,
KOZHIKODE TALUK.

LEGAL HEIRS OF THE DECEASED 1ST PETITIONER ARE IMPLEADED AS ADDL.PETITIONERS 2 TO 4 AS PER ORDER DT.26.9.05 IN I.A. 13852/05

BY SR.ADV. SMT.SUMATHY DANDAPANI
ADV.SRI.JAWAHAR JOSE

RESPONDENTS:

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1. ELAMANA CHINNAMMU, W/O. GOPALAN,
AGED 73 YEARS, PANNIYANKARA AMSOM, DESOM,
KOZHIKODE TALUK.

2. KARAMBATH SAKUNTHALA, W/O.VELAYUDHAN,
AGED 56 YEARS, PANNIYANKARA AMSOM, DESOM,
KOZHIKODE TALUK.

3. CALICUT CORPORATION,
REPRESENTED BY ITS SECRETARY, NAGARAM AMSOM,
DESOM, KOZHIKODE TALUK.

4. ELAMANA RAVEENDRAN, S/O. GOPALAN,
AGED 49 YEARS, PANNIYANKARA AMSOM, DESOM,
KOZHIKODE TALUK.

5. PALATHIL SUNDARAN, S/O. JANU,
AGED 51 YEARS, PANNIYANKARA AMSOM, DESOM,
KOZHIKODE TALUK.

6. PADANNAKKATTU SANTHA, W/O. CHANDRAN,
AGED 46 YEARS, PANNIYANKARA AMSOM, DESOM,
KOZHIKODE TALUK.

7. P.VASANTHA, D/O. JANU,
AGED 43 YEARS, PANNIYANKARA AMSOM, DESOM,
KOZHIKODE TALUK.

R1 & R4 BY ADV. SRI.R.BINDU (SASTHAMANGALAM)
R3 BY ADV.SRI.M.P.PRABHANANDAN, SC, KOZHIKODE CORPN.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 30/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC.NO.5836/05

APPENDIX

PETITIONERS' EXTS:

EXT.P1 – TRUE PHOTO COPY OF I.A.1179/04 IN O.S.60/1990 FILED BY PETR. BEFORE MUNSIFF'S COURT, KOZHIKODE-I.

EXT.P2 – TRUE PHOTO COPY OF ORDER DT.22.7.04 IN I.A.1179/04

EXT.P3 – TRUE PHOTO COPY OF JUDGMENT DT.28.1.05 IN CMA.73/04 OF DISTRICT COURT, KOZHIKODE.

/TRUE COPY/

PIUS C. KURIAKOSE, J.

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W.P.(C)No.5836 OF 2005

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DATED THIS THE 30TH JULY, 2007

J U D G M E N T

The important question which arises in this Writ Petition is whether "decision" of the suit envisaged by Clause (a) of Rule 3 of Order XVII C.P.C. shall be a decision on the merits of the claims and contentions in the suit. As a corollary, the question whether a decision taken purportedly under Rule 3(a) which does not deal with the merits of the claims and contentions can be set aside under Order IX also arises. The question whether appearance of a party through a counsel who is not prepared to conduct the case but only seeks an adjournment will amount to appearance of the party for the purpose of Rule 3(a) also arises.

2. Plaintiff is the petitioner. On her demise during the pendency of the Writ Petition, her legal heirs have been impleaded as additional petitioners. The suit was for prohibitory injunction against trespass into the suit properties. After trial, the suit was dismissed. But the court of first appeal decreed the suit. On Second Appeal to this Court, the suit was remanded with a direction to identify the suit properties with the help of an advocate commissioner and to dispose of the suit within six months. The commissioner filed report and plan. The petitioner

filed I.A.No.410 of 2004 for setting aside that report and plan. The I.A. was dismissed after examining the commissioner. The case stood posted for trial to 1.3.2004. The plaintiff was not present but only sought for an adjournment on the ground that the order on the application to set aside the commissioner's report and plan is proposed to be challenged. The adjournment application was dismissed and the suit was also dismissed. The plaintiff filed I.A.No.1179 of 2004 under Order IX Rule 9 C.P.C. for restoration of the suit which was dismissed by the trial court by Ext.P2 order, holding that the non-appearance of the petitioner on 1.3.2004 was to avoid a decision in the suit and that sufficient cause was not made out for the non-appearance. It was also noticed in Ext.P2 order that a time-limit had been set by this Court which had to be complied with. Against Ext.P2 the petitioner preferred C.M.A.No.73 of 2004 before the District Court and the learned District Judge would paraphrase Order XVII Rule 3 C.P.C. and hold that all the conditions necessary for attracting Order XVII Rule 3 (a) stood satisfied in the case and would accordingly hold that the application for restoration under Order IX Rule 9 was not maintainable and that the remedy of the petitioner was to seek a review of the judgment dismissing the suit or to prefer a regular appeal as provided

under the Code. Noticing that the judgment dismissing the suit does not decide the merits of the claim or the contentions, the learned District Judge would observe that such a dismissal of the suit is also `decision' of the suit at least for the purposes of Rule 3(a) of Order XVII. Despite the above finding, the learned Judge went on to consider the merits of the application and would find that sufficient cause had not been made out and further that genuine grievances of the petitioner, if any, against the order dismissing the commission application could be raised as grounds in the appeal to be filed by her against the decree dismissing the suit. To hold that the application under Order IX Rule 9 is not maintainable, the learned District Judge relied mainly on the judgment of this Court in **Sankara Pillai v. Sankaran** (1987 (2) KLT 382) and that of the Full Bench of the Allahabad High Court in **M.S.Khalsa v. Chiranji Lal** (AIR 1976 Allahabad 290). According to the learned District Judge, appearance through a counsel who files an unsuccessful application for adjournment should be deemed as appearance of the party for the purpose of the rule. The judgments in **Divakara Panicker v. Pathumma and others** (1990 (1) KLJ 787), **Sankara Pillai v. Balakrishnan Nair** (1988 (1) KLT 339) and in **Janakiramaiah**

Chetty v. Partharasarathi (2003 (2) KLT 384) were all distinguished by the learned District Judge on facts.

3. I have heard the submissions of Sri.Jawahar Jose, Advocate on behalf of the petitioner and those of Sri.R.Bindu Sasthamangalam, Advocate on behalf of respondents 1 and 4. I have also heard the submissions of Sri.C.M.Suresh Babu, Standing Counsel on behalf of the 3rd respondent-Calicut Corporation.

4. Mr.Jawahar Jose would flay Exts.P2 and P3 forcefully. He would argue that decision which is contemplated under Clause (a) of Rule 3 of Order XVII is a decision on merits. The disposal of the suit on 1.3.2004 was not a decision on merits but it was obviously a decision by default. There was no appearance of the plaintiff on 1.3.2004 and appearance by the counsel who was not prepared to do anything more than to file an application for adjournment which was turned down by the learned Munsiff will not constitute appearance of the plaintiff for the purpose of the rule. The learned counsel further submitted that, in any view, sufficient cause had been made out by the plaintiff for her non-appearance on the crucial date and the courts below ought to have allowed the application so as to facilitate disposal of the cause on merits. The learned counsel relied on the judgments

in **Sankara Pillai v. Balakrishnan Nair** (1988 (1) KLT 339), **Divakara Panicker v. Pathumma and others** (1990 (1) KLJ 787), **Pokku v. Ammini** (1987 (2) KLT 308), **G.P.Srivastava v. R.K.Raizada** [(2003) 3 SCC 54) and **Janakiramaiah Chetty's** case (2003 (2) KLT 384) for the propositions advanced by him.

5. Sri.R.Bindu Sasthamangalam, learned counsel for the contesting respondents would support Ext.P3 judgment on the basis of the reasons stated therein and submit that there is no warrant at all for interfering with the same within the contours of this Court's very narrow jurisdiction under Article 227 of the Constitution.

6. On going through the counter affidavit which was filed by the respondents to Ext.P1 application, it will be seen that the contention that Ext.P1 is not maintainable was raised only formally and a perusal of Ext.P2 order passed by the learned Munsiff will show that the above contention was not accepted and the learned Munsiff has found Ext.P1 application under Order IX Rule 9 to be maintainable in law. The enquiry in Ext.P2 is confined mainly to the question whether the plaintiff had made out sufficient cause for her non-appearance on the crucial day, i.e., 1.3.2004. The judgment passed by the court on 1.3.2004 reads as follows:-

> "Suit for perpetual injunction.
>
> Plaintiff not present. Her husband was reported to be present in the morning. He was not present when his name was called out. No proof affidavit filed either. D5 present. I.A.No.837/04 filed today on the side of the plaintiff seeking adjournment is dismissed vide separate order. Plaintiff is not ready to tender evidence despite repeated directions. She had not paid the batta ordered to the commissioner either. Hence the suit is dismissed with costs of supplemental D5 for non-appearance of plaintiff."
>
> (underlining mine)

In Ext.P2, the learned Munsiff finds that the plaintiff's non-appearance was deliberate and accordingly holds that the cause shown—her intention to challenge the order passed on the application to set aside the commissioner's report--did not constitute sufficient cause for the purpose of Order IX Rule 9. In other words, it is somewhat clear from Ext.P2 that the learned Munsiff has construed Ext.P2 as an order under Clause (b) of Rule 3 of Order XVII.

7. I shall now extract Rule 3 of Order XVII C.P.C.:-

> "**3. Court may proceed notwithstanding either party fails to produce evidence, etc.--** Where any party to a suit to whom time has been

> granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default,--
>
> (a) if the parties are present, proceed to decide the suit forthwith; or
>
> b) if the parties are, or any of them is, absent proceed under Rule 2."

On going through Ext.P3, it is seen that the learned District Judge has correctly paraphrased Order XVII Rule 3 and found that in order that clause (a) of Rule 3 of Order XVII be attracted, the following conditions should be satisfied:-

1. Time must have been granted to the party concerned to produce his evidence or cause the attendance of his witnesses or perform any other act necessary for the further progress of the suit.

2. The party failed in doing any of the acts enumerated above.

3. The parties must have been present on the day.

4. The suit should have been decided forthwith.

The District Judge noticed that the suit stood originally posted for trial to 26.2.2004, i.e., for the plaintiff to adduce evidence, and on that day the case was adjourned to 1.3.2004, and found that time had been

granted to the plaintiff at her instance for adducing evidence. Accordingly, it was found that the first condition stood satisfied in this case. Noticing that the husband of the plaintiff who was present at the time of roll-call was found absent when his name was called out for commencement of recording of his evidence, the court found that the second condition also stood satisfied, since it was clear that the plaintiff was not prepared to tender evidence on 1.3.2004. I do not find any infirmity about the findings of the learned District Judge regarding the first two conditions which are pre-requisites for justifying a judgment under Order XVII Rule 3(a) of the code.

8. The third condition, as already noticed, is that both the parties should have been present on the crucial day and the fourth condition is that the suit should have been decided forthwith. According to me, the learned District Judge has erred in holding that conditions 3 and 4 also stood satisfied in this case and that the judgment passed on 1.3.2004 dismissing the suit was a judgment under Clause (a) of Rule 3 of Order XVII. According to the learned District Judge, it is not mandatory that the decision which is expected to be taken forthwith under Clause (a) of Rule 3 of Order XVII shall be a decision on merits and dismissal of the suit for default is also a decision of the suit, at least for the

purposes of Rule 3(a).

9. In **Janakiramaiah Chetty's** case [2003 (2) KLT 384 (SC)], the comparative scope of Rules 2 and 3 of Order XVII C.P.C. and the distinction between the two rules were considered by the Supreme Court. Arijit Pasayat, J. who authored the judgment points out that Rules 2 and 3 operate in different and distinct sets of circumstances. Rule 2 applies only when an adjournment has been granted generally and not for any specific purpose. His Lordship held that Rule 3 operates when adjournment has been specifically given for any one of the purposes mentioned in that rule. The basic distinction between the two rules, according to the learned Judge, is that in the former, any party has failed to appear at the hearing while in the latter, the party though present has committed any one or more of the defaults enumerated in the rule. The Explanation to Rule 2 extracted hereunder was noticed by the learned Judge:-

> "**Explanation.—**Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present."

The combined effect of the Explanation to Rule 2 and Rule 3 of Order

XVII is that the power conferred on the court is permissive and not mandatory. The Explanation is in the nature of a deeming provision, when under given circumstances, even an absentee party can be deemed to be present. Noticing the crucial expressions in the Explanation "where the evidence or a substantial portion of the evidence of any party", the learned Judge observes:-

> "There is a positive purpose in this legislative expression. It obviously means that the evidence on record is sufficient to substantiate the absentee party's stand and for disposal of the suit. The absentee party is deemed to be present for this obvious purpose. The court while acting under the Explanation may proceed with the case if that prima facie is the position. The court has to be satisfied on the facts of each case about this requisite aspect. It would be also imperative for the court to record its satisfaction in that perspective. It cannot be said that the requirement of substantial portion of the evidence or the evidence having been led for applying the Explanation is without any purpose. If the evidence on record is sufficient for disposal of the suit, there is no need for adjourning the suit or deferring the decision."

The learned Judge goes on to analyse the judgment which was impugned in that case and finds that the judgment has imprints of an

ex parte adjudication and not of a decision on merits since there is not even an indication as to what evidence was evaluated or whether the merits of the claims and contentions were tested. The above view of the Supreme Court, though they are specifically expressed with reference to a judgment under the Explanation to Rule 2 of Order XVII, in my opinion, should apply in the case of disposals under Order XVII Rule 3(a) also. In fact, the learned Judge has also observed that unless the judgment in question discusses the merits of the case, preferring of a regular appeal will be really inconsequential since no definite grounds of appeal can be pressed into service except making generalised challenges. I also feel that it cannot be the legislative intent to encourage preferring of regular appeals in situations where the appellants are unable to raise definite grounds challenging the merits of the decision under appeal.

10. U.L.Bhat and K.G.Balakrishnan, JJ. in **Sankara Pillai v. Balakrishnan Nair** (1988 (1) KLT 339) have also analysed the relative scope of Rules 2 and 3 of Order XVII C.P.C. Their Lordships held that where Rule 2 applies, ordinarily the disposal shall be under Order IX and disposal on the merits of the matter is possible only by virtue of the Explanation to Rule 2. As regards Rule 3, their Lordships

say that Rule 3 can be invoked only when both parties are present and even if the disposal purports to be on merits, unless the conditions necessary for disposal under Order XVII Rule 3 (a) are satisfied, the provisions of Order IX C.P.C. will apply. In my opinion, this judgment also sufficiently indicates that a decision under Rule 3(a) of Order XVII, as in the case of a decision under the Explanation to Rule 2 of Order XVII, shall be a decision on merits.

11. S.Padmanabhan, J. in the decision in **Divakara Panicker v. Pathumma and others** (supra) has clearly indicated that decisions which are contemplated under the Explanation to Rule 2 of Order XVII and under Clause (a) of Rule 3 are decisions on the merits of the claims and contentions. His Lordship holds that the power conferred on courts under Clause (a) of Rule 3 of Order XVII to decide the suit on the merits for the default of a party (default need not be of appearance but in the matter of performance of the acts enumerated under Rule 3) is a drastic power which seriously restricts the remedy of the unsuccessful party for redress. It has to be used only sparingly in exceptional cases. In order to decide the suit on merits, the mere existence of the conditions enumerated under Rule 3 alone will not be sufficient. There must be some materials for a decision on the merits

even though the materials may not be technically interpreted as evidence. Sometimes, the decision in such cases could be on the basis of pleadings, documents and burden of proof. The learned Judge also observed that it is appreciable for the court to indicate by the judgment that the decision is for default or on merits. The learned Judge would observe:-

> "The only alternative of the court in cases covered by Rule 3 or the Explanation to Rule 2 is not to decide on the merits alone. If such an interpretation is given, it will amount to an unjustified preference to one who purposely absents than to one who presents but is unable to proceed with the case."

In my opinion, a decision purportedly made under Rule 3(a) unless the same is on merits will have to be construed as a decision under Rule 3 (b) itself. In fact, there is considerable volume of judicial authority in support of the view.

12. There is sufficient indication in the judgment of the Supreme Court in **Prakash Chander v. Janki Manchanda** (AIR 1987 SC 42) that the decision which is envisaged under Order XVII Rule 3(a) is a decision on merits, though the learned District Judge observed that the decision cannot be said to be a direct one on the point. The judgment of Sadasivan, J. in **Abdulla Haji v. Mammunhi Barikat** (1969 KLT

433) is a direct authority for the proposition that disposal envisaged under Clause (a) of Rule 3 is a disposal on merits. His Lordship notices that two phases are contemplated under Order XVII Rule 3. The first is default on the part of the plaintiff to perform the acts necessary for the further progress of the suit. The second phase is that the court shall proceed with the suit notwithstanding the default. According to the learned Judge, even when it is noticed that there is default on the part of the party to do what he was expected to do, then, the court shall proceed with the suit and decide the suit on the basis of the available materials rather than dismiss the suit by a one-word judgment. In fact, the learned Judge followed the views of the Jammu and Kashmir High Court in **Sonaullah v. Sultan Jan** (AIR 1952 Jammu & Kashmir 21) and held that the words "proceed to decide the suit forthwith" notwithstanding default suggest that the case must be one where in spite of the default of a party, it must have been possible for the court to come to a decision of the suit—a decision on the merits of the case, on the materials available before the court.

13. A Division Bench consisting of T.S.Krishnamoorthy Iyer and P.Unnikrishna Kurup, JJ. in **Pokker Haji v. Muhammed Barami** (1971 KLT 438) has observed that in order that Rule 3 of Order XVII

applies, the disposal of the suit shall be on the basis of the evidence already on record and not on the basis of any evidence which is adduced after the default to perform any acts under Order XVII Rule 3 occurred. This decision, in my view, clearly implies that disposals under Clause (a) of Rule 3 of Order XVII shall be disposals on merits. A Full Bench of the Bombay High Court in **Basalingappa v. Shidramappa** (AIR 1943 Bombay 321) considered the relative scope of Rules 2 and 3 of Order XVII. Their Lordships held that the mere fact of a party making any default of what he was directed to do would not lead to a dismissal of the plaintiff's suit, if the plaintiff was the party in default, or the decreeing of the claim against the defendant, if the defendant was the person who made the default. According to their Lordships, the words "notwithstanding such default" in Rule 3 clearly imply that the court is to proceed with the disposal of the suit in spite of the default, upon such materials as are before it. Thus this decision clearly takes the view that decisions under Clause (a) of Rule 3 shall be decisions on the merits of the claim. The judgment of P.Govinda Menon J. in **Kunjannam v. A.Issac** (1961 KLT 653) was in a case where the suit after undergoing several adjournments stood posted for production of succession certificate by the plaintiff. On the

relevant date, the plaintiff did not produce the succession certificate but only applied for adjournment. The adjournment application was dismissed and the suit was also dismissed for default. The learned Munsiff, without specifically referring to Order XVII Rule 3(a) held that the restoration application was not maintainable. Taking the view that even when a suit is dismissed on the reason of non-performance of an act required to be done under Rule 3(a) of Order XVII, then also the dismissal shall be on the reason that the evidence in the case falls short of upholding the claim and not on the reason of default of appearance or non-performance alone, the learned Judge ruled that the restoration application was maintainable.

14. The judgments of the Rajasthan High Court in **Gopikishan v. Ramu** [AIR 1964 Rajasthan 147(FB)] and the Orissa High Court in **Hindustan Steel Ltd. v. Prakash Chand** [AIR 1970 Orissa 149 (DB)] also indicate that those courts are of the view that decision under Clause (a) of Rule 3 of Order XVII shall be a decision on the merits and that even if it is a dismissal of the suit, the dismissal shall be on the reason that there is lack of evidence to uphold the claim and not on the reason that the plaintiff is absent or has not performed the acts which he was expected to perform under Rule 3. In **A.K.P.Haridas v.**

V.A.Madhavi Amma (AIR 1988 Kerala 304), while holding that an application under Order IX Rule 13 is maintainable for setting aside a decree passed under Order VIII Rule 10, S.Padmanabhan, J. has indicated that decrees which are contemplated under Rule 3(a) of Order XVII are decrees on merits and not decrees which do not advert to the pleadings or evidence available on record.

15. The Madras High Court in **Pazhaniandi v. Naku** (AIR 1927 Madras 109) has also ruled that the expression "notwithstanding such default" implies that the court is to proceed, in spite of default, with the disposal of the suit on merits. The Full Bench of the Allahabad High Court in **Munna Lal v. Jai Prakash** (AIR 1970 Allahabad 257) also takes the view that a decision under Order XVII Rule 3 is expected to be a decision on merits. The judgment of G.Kumara Pillai, J. in **Varghese v. Kesavan** (1960 KLT 648) also indicates that decisions under Order XVII Rule 3 are to be decisions on merits.

16. It was the judgment of T.Kochu Thommen, J. in **Sankara Pillai v. Sankaran** (1987 (2) KLT 382) which is relied on by the learned District Judge. That of course was a case where the disposal was not on merits and the plaintiff's counsel continued to be physically present in court even after the rejection of the adjournment

application. However, the learned Judge held that since the conditions under Order XVII Rule 3(a) stood satisfied, the trial court was justified in dismissing the suit and the aggrieved plaintiffs had a remedy by way of regular appeal. But in the light of **Sankara Pillai v. Balakrishnan Nair** (supra), subsequent judgment of Padmanabhan J. in **Divakara Panicker's** case with which I am in respectful agreement, the judgment of the Supreme Court in **Janakiramaiah Chetty's case** (supra) and the observations of the Division Benches of the various High Courts discussed above, the view of Kochu Thommen, J. in **Sankara Pillai v. Sankaran** will have to be found to be not correct. I notice that many a relevant precedent including the judgment of Division Bench in **Pokker Haji's** case and the judgment of Sadasivan, J. in **Abdulla Haji's** case and the judgment of Govinda Menon, J. in **Kunjannam's** case were not brought to the learned Judge's notice even.

17. A careful reading of the majority judgment in **M.S.Khalsa v. Chiranji Lal** (AIR 1976 Allahabad 290), which is very much relied on by the learned District Judge for his view that appearance by an advocate who only files an application for adjournment will constitute appearance of the plaintiff for the purpose of Order XVII Rule 3 will

show that that Bench also assumes that a decree passed under Order XVII Rule 3(a) is on the merits of the claims and contentions.

18. Thus, according to me, in as much as the judgment and decree passed by the learned Munsiff on 1.3.2004 do not deal with the merits of the claim, the fourth condition of "deciding" the suit has not been satisfied.

19. It is now necessary to consider whether the third condition that both the parties should have been present on the relevant date has been satisfied. The learned District Judge has relied on the decision in **Sankara Pillai's** case (1987 (2) KLT 382) and that of the Full Bench in **M.S.Khalsa's** case (supra) to take the view that appearance by counsel, even it is for the sole purpose of making an adjournment application will amount to presence of the party for the purpose of Order XVII Rule 3 C.P.C. Though **Divakara Panicker's** case (supra) and **Sankara Pillai v. Balakrishnan Nair** (1988 (1) KLT 339) were cited before the learned District Judge for the contrary view, those decisions were distinguished by the learned District Judge. It was observed that in **Divakara Panicker's case** the counsel reported no instructions. But in the present case, no such report was made by the counsel. As for **Sankara Pillai's** case, the learned Judge would

observe that the question whether appearance by counsel will amount to deemed presence of the party for the purpose of Order XVII Rule 3 (a) did not specifically arise in that case. The Full Bench decision of the Allahabad High Court in **M.S.Khalsa's** case was a direct precedent, according to the learned District Judge.

20. It is true that in **M.S.Khalsa's** case, the Full Bench of the Allahabad High Court has taken the view that appearance through an advocate who applies only for adjournment and is not prepared to conduct the case will be deemed presence of the party for the purpose of Order XVII Rule 3. But, it appears, that the difference in the rule position obtaining in our State and in Allahabad was not noticed by the learned District Judge. Order XVII Rule 2 by virtue of the amendment made by the Allahabad High Court reads as follows:-

> "Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.
>
> Where the evidence, or a substantial portion of the evidence, of any party has already been recorded and such party fails to appear on such day, the court may in its discretion proceed with the case as if such party were present, and may dispose of it on the

merits.

Explanation.-- No party shall be deemed to have been failed to appear if he is either present or is represented in court by agent or pleader, though engaged only for the purpose of making an application."

Order XVII Rule 3 as it obtains in Allahabad clearly provides that the rule shall not apply in a case where Rule 2 does apply. The view of the Full Bench in **M.S.Khalsa's** case (supra) that appearance through a counsel who has been instructed only for the purpose of making an adjournment application and is not prepared to conduct the case will be deemed presence of the party for the purpose of Order XVII Rule 3 has been given in the light of the position emerging from Rules 2 and 3 of Order XVII as obtained in that High Court.

21. S.Padmanabhan, J. in **Divakara Panicker's** case (supra) after referring to a catena of decisions, has clearly ruled that the trend of authorities supplied by decisions of various High Courts is unanimous on the point that the presence or appearance of a party or counsel without preparedness to co-operate for the progress of the case cannot be treated as presence attracting Rule 3(a) which is a condition precedent to the decision on merits except in cases covered by the Explanation to Rule 2.

22. A Division Bench of the Calcutta High Court in **Sohanlal v. Kedarnath** (AIR 1969 Calcutta 516) has held that mere physical presence of the lawyer without preparedness to conduct the case will not constitute appearance for the purpose of Order XVII Rule 2 or Rule 3. Justice Sadasivan, J. in **Abdulla Haji v. Mammunhi Barikat** (1969 KLT 433), after referring to the judgment of the Madras High Court in **Kaliappa Mudaliar v. Kumarasami Mudali** (AIR 1926 Madras 971), has endorsed the view that mere physical presence of party or pleader without readiness to participate in the proceedings will not amount to appearance for the purposes of Order XVII Rule 3. The Division Bench of the Orissa High Court in **Hindustan Steel Ltd.** (supra) has also expressed the view that what is necessary for the purpose of Order XVII Rule 3 is appearance by party or counsel with readiness to participate in the proceedings.

23. The Full Bench of the Madhya Pradesh High Court also has ruled in **Rama Rao v. Shantibai** (AIR 1977 Madhya Pradesh 222) that for deciding whether appearance of a counsel in the absence of a party will amount to appearance by the party for the purpose of Order XVII Rule 3, the essential question to be considered is whether the advocate had been instructed for conducting the case. By majority,

the Full Bench answered the questions which were referred, in the following terms:-

(1) If, when a suit is called on for hearing, a party's counsel appears and seeks adjournment but when adjournment is refused he retires saying that he has no instructions, it will be no appearance of the party and Rule 2 of Order XVII C.P.C. alone would be attracted. However, in such a case, the defaulting party must show sufficient cause for non-appearance as well as for not fully instructing the counsel.

(a) If the counsel had sought adjournment because he was instructed by his client to ask for an adjournment only, and not to proceed with the trial if adjournment be refused or (b) If the counsel feels a necessity to seek adjournment so that he may prepare himself and, on his own, seeks adjournment which is refused, it will be no appearance of the party and Rule 2 of Order XVII C.P.C. alone would be attracted.

2. If, when a case is called on for hearing, the counsel appears (without making any request for adjournment) merely to inform the Court that he has no instructions and, therefore, would not appear, it will be no appearance of the party and Rule 2 of Order XVII C.P.C.

alone would be attracted.

24. The Division Bench of the Madras High Court in **Ellammal v.Karuppan Chetti** (AIR 1936 Madras 625) has also taken the view that appearance by a counsel who does not do anything other than to apply for adjournment will not constitute appearance of party for the purpose of Rule 3 of Order XVII. The Madras High Court in **Pazhaniandi's** case (supra) has gone to the extent of holding that even mere physical presence of a party in court when his vakeel applied for adjournment and the adjournment was refused will not amount to appearance by the party for the purpose of Rule 3 of Order XVII. The Supreme Court has observed in **Sangram Singh v. Election Tribunal, Kotah** (AIR 1955 SC 425) that our laws on procedure are based on the principle that as far as possible the proceeding in a court of law should not be conducted to the detriment of a person in his absence. Physical presence without readiness to co-operate for anything connected with the progress of the case does not serve any useful purpose in deciding the case on merits and the policy of courts which are established for subserving the cause of justice is to facilitate the adjudication of causes on their merits rather than by default. As observed by S.Padmanabhan, J. in **Divakara Panicker's**

case (supra), the power to decide the suit on merits under Order XVII Rule 3(a) seriously restricts the remedy of the losing party for redress. It could not have been the legislative intent to place an absentee party in a more advantageous position than a party who is present but is unwilling to co-operate on a given reason.

25. Considering the ratio emerging from the various decisions referred to hereinbefore and also on first principles, I hold that presence of an advocate who appears on the crucial day only for applying for an adjournment and is not prepared to conduct or to defend the case will not be appearance of the party for the purpose of Order XVII Rule 3. It may be true that the counsel in the present case did not report "no instructions". But he did express his inability to go on with the trial and was not in fact prepared to go on with trial. That is sufficient to hold that the third condition under Order XVII Rule 3 was also not satisfied in this case and Ext.P1 application under Order IX Rule 9 C.P.C. filed by the plaintiff was well maintainable in law. As already noticed, the learned Munsiff found the application to be maintainable and considered the same on its merits.

26. The question which remains to be considered is whether the courts below were justified in dismissing the application on the reason

that sufficient cause had not been made out for the non-appearance of the plaintiff-petitioner on 1.3.2004. The explanation offered by her for not being present in court and for not instructing her counsel to continue with the case was that her earlier application for setting aside the commissioner's report had been dismissed and that she wanted bona fide to challenge that order. The learned District Judge also seems to feel that it is probable that the plaintiff has a legitimate grievance regarding the dismissal of her application for setting aside the commissioner's report, but according to the learned Judge that grievance could be voiced through a regular appeal which the plaintiff may have to file in the event of the suit being decided against her. It was agreed to before me by both sides that the commissioner's report and plan will be crucial for deciding the suit and that with the present report on record, the petitioners are likely to have difficulties in the suit which had been remanded by this Court for the purpose of taking out a commission. The expression "sufficient cause" is an elastic one for which no hard and fast guidelines can be given. S.Padmanabhan, J. in **Pokku's** case (supra) has held that the nature of the claims and contentions and the effect which the decision of the case will have on the rights of parties cannot be ruled out as totally

foreign to the area of consideration in petition under Order IX under all circumstances. The learned Judge goes on in that judgment to say that even in cases where the court is not fully satisfied of the sufficient cause, an order allowing the application under Order IX can be made putting the parties to terms, if the court feels that such a course is necessary for doing justice to the parties. Of course, courts must be cautious to make all attempts to curb the law's delays by discouraging mala fide attempts to protract litigations under the guise of sufficient cause. Judicial verdict on any application under Order IX Rule 9 shall take a compromising position as between the various interests involved. The Supreme Court in **G.P.Srivastava's case** (supra) after observing that the petitioner is expected to give sufficient cause for his non-appearance on the crucial day and not for his defaults which occurred prior to that, has ruled that the expression "sufficient cause" shall be liberally construed and the approach should not be in a technical and narrow manner. The court further found that even if it is seen that there has been some negligence on the part of the petitioner, the question to be considered is whether the other side cannot be compensated by costs. Adopting too technical an approach is likely to result in prolonging the litigation indefinitely.

27. A reading of Ext.P3 will show that the circumstances that the plaintiff was not ready for trial on 26.2.2004 and that she did not pay the additional batta which was due to the advocate commissioner weighed with the learned District Judge as circumstances indicating that she wanted to protract the trial. As for the lack of readiness on the part of the plaintiff on 26.2.2004, the same is not to be made a consideration, going by the judgment of the Supreme Court in **G.P.Srivastava v. R.K.Raizada** [(2000) 3 SCC 54]. No explanation was offered at the Bar as to why the plaintiff had not paid the batta ordered by the court to the advocate commissioner. However, since it is found that the application under Order IX Rule 9 C.P.C. is maintainable, non-payment of batta could not have been made a reason for dismissing the suit since the order directing payment of batta could have been got executed by the advocate commissioner as any other executable order. Considering the totality of the circumstances which attend on this case and the interests of justice, I am of the view that the application should have been allowed by imposing reasonable terms.

28. In the result, I set aside Exts.P2 and P3 and allow Ext.P1 I.A. on the following terms:-

1. The petitioners shall pay the additional batta ordered by the court as payable to the advocate commissioner, together with interest thereon at 12% per annum from the date fixed by the court for payment till actual payment, to the advocate commissioner and file a memo before the court below.

2. The petitioners shall pay as costs a sum of Rs.9000/- (Rs.Nine Thousand only) to the contesting respondents either directly or through their counsel in this Court, within one month of receiving copy of this judgment and file a memo in the court below.

3. The petitioners shall pay Rs.1000/- (Rs.One Thousand only) to the High Court Legal Services Committee within the aforesaid period as further costs and produce the receipt before the court below.

If the above conditions are not complied with by the petitioners, Exts.P2 and P3 will stand confirmed.

The Writ Petition is allowed as above.

(PIUS C.KURIAKOSE, JUDGE)

tgl

AIR 1943 Bombay 321 FB

AIR 1972 Gauhati 25 – Order under Rule 3 is an order on merits. Merely because the court mentions Order XVII Rule 3, it cannot be said that the order was made under that rule and not under Order XVII

Rule 2. In the case of default under Order XVII Rule 2 coupled with default under Order XVII Rule 3, disposal must be held to be under Order XVII Rule 2 and not under Rule 3.

1963 KLT 256 – the construction of Order XVII Rule 2 and Rule 3 should be such that where it is permissible to treat an order as falling within the ambit of Rule 2, it must be taken as being outside the ambit of Rule 3 for the obvious reason that Rule 3 is a more stringent provision requiring a strict construction.

AIR 1977 M.P. 222 – Order under Rule 3 is an order on merits.

AIR 1936 Madras 625

AIR 1953 Rajasthan 1.

AIR 1927 Madras 109

1971 KLT 438

1960 KLT 648

1980 KLT 468

1988 Kerala 304

AIR 1970 Allahabad 257

The fact that the court cited Order XVII Rule 3(a) for the purpose of dismissing a suit is not conclusive on the question whether the

decision was on merits or not. In every case, court will have to find out whether really the decision was on merits. In cases where the suit is dismissed for non-prosecution, the decree cannot be on merits as there will be no evidence at all for the appellate court to consider. In such cases, what the appellate court should do if it accepts the case of the applicant is to set aside the decree on the ground that the trial court was not justified in proceeding under Order XVII Rule 3 and remand the case. Thus, the parties will be in the same position as they would have been if the defaulting party would have been originally permitted to file restoration application and had not been compelled to file an appeal. Where even though the judge had stated that the suit was being disposed of under Order XVII Rule 3 and the real meaning and substance of the court action was only to dismiss the suit for non-prosecution, it was held that an application for restoration was maintainable.

Order XVII Rule 2 - Allahabad amendments

Where the evidence or a substantial portion of the evidence of any party has been already received and such party fails to appear on

such day, the court may in its discretion proceed with the case as if such party were present and may dispose of it on the merits.

Explanation.-- No party shall be deemed to have been failed to appear if he is either present or is represented in court by agent or pleader, though engaged only for the purpose of making an application.

Order XVII Rule 3 – Allahabad amendments

put a comma after the first word "where" and insert thereafter the words "in a case to which Rule 2 does not apply".

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